Kaumagraph Corporation *and* United Steelworkers of America, AFL–CIO–CLC. Case 4–CA–20367

March 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

On June 15, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent also filed cross-exceptions to the judge's decision, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel and the Charging Party have excepted to the judge's failure to make an affirmative finding that the Respondent's recognition of the Union on July 25, 1991, was pursuant to a settlement agreement approved by the Regional Director on September 30, 1991. The record supports this assertion and we so find.

[2] In rejecting the Respondent's 10(b) defense regarding the 8(a)(3) allegations, the judge noted that the Respondent had failed to argue that the 10(b) period should be measured from March 1991, when, as the judge found, the Respondent had made a tentative decision to relocate the plant to Michigan. The judge held that the Respondent waived a 10(b) defense by failing to make this argument. We agree that the allegations in this case were not barred by Sec. 10(b), but we do not rely on this waiver finding.

Chairman Gould notes that the judge applied the test of *Dubuque Packing Co.*, 303 NLRB 386, 391 (1971), in finding that the Respondent did not violate Sec. 8(a)(5) with respect to its plant relocation decision. Chairman Gould questions the validity of *Dubuque*, but he finds no need to address that issue here. He concurs in the judge's decision to dismiss the complaint because the Union had a sufficient opportunity to bargain about the relocation decision in advance of its implementation and was unable to present sufficient concessions or alternatives to relocation. Consequently, the parties had reached a good-faith impasse on the subject of relocation prior to the Respondent's lawful implementation of its decision.

Mark E. Arbesfeld, Esq., for the General Counsel.
Doreen S. Davis and *Arlene J. Angelo, Esqs.*, for the Respondent.
Daniel M. Kovalik, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me in Philadelphia, Pennsylvania, pursuant to charges filed and served on January 14 and amended on May 21, 1992, and complaint issued on October 30, 1992, alleging Kaumagraph Corporation (the Respondent) has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by closing its facility in Wilmington, Delaware, and relocating work from there to its facility in Michigan. Respondent denies it has violated the Act.

On the entire record,[1] including my observation of the demeanor of the witnesses as they testified, and after considering the able posttrial briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all times material to this proceeding, Respondent has been a Delaware corporation with offices and places of business in Wilmington, Delaware, where it has been engaged in hot-melt rotogravure printing. From 1991 until it closed its Delaware facility in February 1992, Respondent, in conducting its business operations above described, sold and shipped goods valued in excess of $50,000 from Wilmington, Delaware, directly to points located outside that State. At all times material to this proceeding, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At all material times, United Steelworkers of America, AFL–CIO–CLC (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE USE OF BACKGROUND EVIDENCE

On June 21, 1991, a consolidated complaint issued against the Respondent in Case 4–CA–18961, et al., alleging, among other things, that Respondent, acting through its vice president and general manager, David Burke, threatened its employees with job loss, plant closure, a refusal to bargain with the Union if the employees selected the Union to represent them, and other retaliation. On September 30, 1991, the Regional Director for Region 4 of the National Labor Relations Board approved a settlement agreement covering these items as well as others. That agreement has not been set aside.

In the instant case the General Counsel established, through the uncontroverted and credible testimony of employees Dolores Petrucci, Emma Towles, Norma Smith, and Ronald Smith, that: (1) David Burke told employees in early 1990, at a time the Union was attempting to organize Respondent's employees, that he would not deal with the Union, would do anything he had to in order to keep the Union out, did not care what it cost, and he would close the

[1] The General Counsel's motion to correct the record, with which the other parties concur, is granted. The General Counsel's motion to strike portions of Respondent's brief and Exhs. A and B attached thereto is granted for the good and sufficient reasons set forth in the General Counsel's motion.

plant and move elsewhere and then would not have to deal with the Union; (2) George Rosica, Respondent's president, said in 1990 he would shut the plant down before he would allow the Union in, would and could move if he had to, and the employees had to choose either the Union or the Company; and (3) Richard Spearance, a stipulated supervisor, told employee Lambert about 3 weeks before his August 9, 1991 layoff that Rosica had told him the Wilmington plant would be closed down if the Union got in. All of these statements by David Burke, George Rosica, and Richard Spearance are attributable to Respondent, *3E Co*., 313 NLRB 12 fn. 1 (1993), and, inasmuch as neither Rosica nor Spearance testified, I conclude Spearance's statement to Lambert was a truthful account of Rosica's statement which is consistent with Rosica's remarks to others as recited above. Compare *American Art Clay Co*., 148 NLRB 1209, 1219 fn. 16 (1964).[2] All the foregoing statements of Respondent's agents occurred prior to the approval of the settlement in the earlier case and, with the possible exception of Spearance's statement, more than 6 months prior to the first charge filed and served in this case. The General Counsel does not allege them to be violations of the Act in this proceeding, but proffers them as background evidence shedding light on Respondent's motivation in relocating bargaining unit work from Wilmington, Delaware, to Flint, Michigan.

Respondent protests that threats which were the subject of a settlement agreement, as here, cannot now be used as proof of an unlawful motive in relocating the work and that this case does not involve a situation where the subject of a settlement agreement is used only as background evidence in appraising Respondent's motives and objectives. Respondent proffers *Barnes & Noble Bookstores*, 237 NLRB 1246 (1978), as support for the proposition that the threats related above cannot be relied on as proof of animus to establish the alleged violation of Section 8(a)(3) of the Act. This is not quite what the Board held in *Barnes*. What the Board there said, at 1246 fn. 1, was, ''While we do not rely solely on [a prior finding of employer unfair labor practices] as proof of [union] animus, Respondent's prior unfair labor practices can properly be noted as background.'' Moreover, the Board has recently held that presettlement conduct evidencing union animus may be used to ''shed considerable light'' on the employer's motivation in acting as it did after the settlement of earlier charges, *Special Mine Services*, 308 NLRB 711 (1992); and, as Respondent recognizes in its posttrial brief, it is well settled that the Board may use conduct beyond the 6 months' period established in Section 10(b) of the Act,[3] *Machinists IAM Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960); and regarding presettlement conduct, *Northern California District Council of Hodcarriers (Joseph's Landscaping)*, 154 NLRB 1384 (1965), as background evidence in appraising Respondent's motivation for its conduct alleged to be unlawful in the case before me, so long as the General Counsel's case does not rely solely on the evidence proffered as background evidence. Bearing the latter caution in mind, yet recognizing the verity of the wise statement by Administrative Law Judge Maloney in *Marcus Management*, 292 NLRB 251, 262 (1989), that ''there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will,'' I conclude the evidence of presettlement threats recited hereinabove is properly admissible as background evidence to consider in evaluating the motivation of Respondent for its conduct in the case before me in accord with the teachings of *Bryan*, supra, and *Joseph's*, supra.

IV. THE TIMELINESS OF THE AMENDED CHARGES

The original charge filed by the Union in this case on January 13, 1992, was served on Respondent on January 14, 1992. It alleged Respondent had violated Section 8(a)(5) and (1) of the Act and stated the following as the basis for the charge:

> On or about October 2, 1991 the above named employer announced a relocation of its Wilmington, DE operations to a sister facility in Flint, Michigan in violation of the Act.
>
> The employer failed to bargain in good faith and instead carried through on a previously documented threat to relocate the plant if the employees selected the United Steelworkers of America as their collective bargaining representative.
>
> The Union requests relief granted under Section 10(j) of the Act in order to stop this illegal relocation.

The amended charge filed by the Union and served on May 21, 1992, is identical to the January 13 charge with the single exception that it alleged the above-described conduct to be violative of Section 8(a)(1), (3), and (5) of the Act.

Respondent contends the amended charge was filed more than 6 months after the conduct alleged there and that the subsequent inclusion of an allegation of a violation of Section 8(a)(3) of the Act contravenes Section 10(b) of the Act. I do not agree. The complaint alleges in relevant part:

> 6(a) In or about February 1992, a more precise date presently being unknown to the General Counsel, Respondent closed its Wilmington facility and relocated the work of the Unit to the Flint facility.
>
> (b) Respondent engaged in the conduct described above in subparagraph (a), because Respondent's employees selected the Union as their collective bargaining representative and in order to avoid its collective bargaining obligation of the Union.
>
> (c) The subjects set forth above in subparagraph (a), relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.
>
> (d) Respondent engaged in the conduct described above in subparagraph (a) without affording the Union

[2] Respondent's reliance on the treatment of statements by Collichio and Hamilton in *American Packaging*, 311 NLRB 482 (1993), for the proposition Spearance's report to Lambert was hearsay devoid of evidentiary worth, is misplaced. The statement of Collichio, a department manager, to the effect that Employer's general manager had stated employees would in no case receive a bonus was, unlike the situation here, denied by the general manager. Moreover, Hamilton's statement to an employee that the bonus was less than usual because of ''you guys,'' apparently a reference to union activity, had no weight because there was no showing he was a supervisor or agent of American Packaging Corporation.

[3] Sec. 10(b) provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing and service of the charge.

an opportunity to bargain with Respondent with respect to this conduct.

7. By the conduct described above in paragraphs 6(a) and 6(b), Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

8. By the conduct described above in paragraph 6, Respondent has been failing and refusing to bargaining collectively and in good faith with the exclusive collective bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

These allegations are consistent with the descriptive statement which the Union typed on both the original and amended charges. The detailed allegations in the charges are not only closely related, they are identical, allege unlawful motivation, are based on the same facts, and express the same legal theory of bad-faith bargaining and the perfecting of a previous threat to relocate in retaliation for its employees' selection of the Union as their collective-bargaining representative. The amended charge places no additional burden of proof on Respondent, is factually closely related to the original charge, and is not time barred. *Redd-I, Inc*., 290 NLRB 1115 (1988); *W. H. Froh, Inc*., 310 NLRB 384 fn. 2, 386 fn. 6 (1993); *Overnite Transportation Co*., 296 NLRB 669 (1989). Accordingly, the 8(a)(1), (3), and (5) allegations are appropriately before me for decision.

V. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Stipulations*

The parties stipulated that: (1) Kaumagraph Flint Corporation (KFC) is a separately incorporated business; (2) KFC and Respondent have common ownership; and (3) Respondent's decision to close its Wilmington, Delaware plant and transfer all the work performed by the unit of employees represented by the Union to one of the KFC plants in Flint, Michigan, was a relocation of unit work unaccompanied by any basic change in the nature of the transferred operations. It is further stipulated that there is no allegation that Respondent bargained unlawfully concerning the effects of its decision to close the Wilmington, Delaware facility.

B. *Facts Found*

Respondent has recognized the Union as the designated exclusive collective-bargaining representative of its employees in a unit appropriate for purposes of collective bargaining since July 25, 1991, pursuant to a recognition agreement of that date.

The appropriate unit is:

> All regular full-time production and maintenance employees employed at Respondent's 400 South Madison Street, Wilmington, Delaware facility, excluding all other employees, artists, professionals, laboratory technicians, office clericals, watchmen, guards and supervisors as defined in the Act.

The Union and Respondent subsequently had bargaining sessions on August 9, 16, 27, and 29; September 6, 11, and 18; and October 2, 1991. Although others, notably Burke, Respondent's vice president and plant manager at Wilmington, were present at some of these meetings, the chief negotiators always present for Respondent were its attorney, Anthony F. Visco Jr., who was its primary spokesman, and Thomas Cetola, its executive vice president. The Union's staff representative, Norman Hayman, was the Union's chief spokesman. Hayman and Cetola were the only negotiations participants to testify in this case. All parties heavily rely on the testimony of Hayman, a credible witness, in recounting the content of the bargaining meetings. I find that reliance well placed and credit Hayman's account as well as the supplementary testimony of Cetola, who did not testify in as great a detail as did Hayman concerning negotiations.

Visco opened the first meeting with the announcement that Respondent was considering moving its Wilmington operations to the KFC plant in Flint, Michigan. Visco announced the move was being considered because there had been a several million dollar decrease in sales at both locations, anticipated new business had failed to materialize, the cost of rent and utilities at Wilmington was far greater than that in Michigan,[4] and AC Delco (Delco), the sole customer of KFC and Respondent at the time, wanted ''next day delivery'' to its Michigan facility, which was much closer to the KFC plant than Wilmington, which propinquity would favor a move of the work to Michigan, and thus closer to the customer. Hayman responded that the Union had some success in other cases in getting a rent reduction. Either Visco or Cetola remarked that if the Union could do that, the Company might be in business.

Hayman further recalls that during the meeting Visco gave him specific information of approximately $10 million worth of work scheduled for the Wilmington plant that had been lost, told him Respondent had been hoping to retrieve work previously lost to Kent Plastics, and that the Wilmington plant here involved had been built in 1989 in anticipation of work from European customers that did not come forth. At the time of this meeting, all of the Wilmington facility's production was being shipped to the Flint plant rather than to Delco, their common and sole customer. Kaumagraph Dry Transfer Corporation (KDT), Kaumagraph Electroluminescence Products, Inc. (KEL), and Kaumagraph Corp. U. K. Limited were all corporations related to Respondent Kaumagraph Corporation rather than Kaumagraph Flint Corporation and had been terminated prior to these negotiations, KEL and KDT due to losses, and the U. K. operation because expected business simply did not materialize.

By letter of August 14, 1991, the Union requested Respondent to furnish financial records including income tax returns to assist the Union in its assessment of Respondent's financial condition. These records were furnished and forwarded by Hayman to the Union's offices for review on August 30. On September 6, Jerry Sokolow, a research associate

[4] Visco advised there had been a $5 million decrease in sales at the KFC facility and a sales decrease of $6 million at Wilmington during the fiscal year ending June 1989. He particularly noted that the $43–$44,000 monthly rent at Wilmington was far more than the KFC monthly mortgage payment of about $5500, and Flint's ulitities cost was about half the $10–$15,000 monthly heat and electric bill at Wilmington.

for the Union, after personal interviews with Cetola and an examination of these records, sent Hayman an analysis indicating among other things that the Respondent had an operating loss of $1,856,271 and a net loss of $3,394,921 in the fiscal year ending June 30, 1991, while KFC had an operating profit of $2,597,205 and a net profit of $1,166,463 at its Millington, Michigan plant, and that showed that the ratio of current assets to current liabilities at Respondent's Wilmington plant was well below what would be an indication of a sound short-term financial condition.

When the parties met on August 16, Burke had joined the group. Hayman asked what Respondent would need to remain open in Wilmington. Visco replied he was not then able to say, but would probably be able to do so at the next meeting. Burke said the quality of the Wilmington production was inferior to that at KFC's Michigan facility, and specifically recalled an occasion when all the work produced in Wilmington and forwarded to KFC had to be resorted[5] in Michigan because Delco had demanded it. He further relates that the Delco assembly line had been idled because the Wilmington-produced parts were unacceptable and, further, that Delco had advised KFC to move the production line to Michigan ''or else.'' In this connection, Burke explained that Delco required ''just-in-time delivery,'' which meant the product had to be available within 4 hours of the time Delco started its production line. As Hayman recalls, ''next day delivery'' had been mentioned at the previous negotiation session as the standard required.

On August 27, Visco advised the negotiators that a decision on relocation of the work would be reached in mid-September, but it was just a matter of ''how long you bleed.'' He further stated an immediate infusion of $4 or $5 million dollars' worth of new business would be necessary to assure Respondent would continue to operate in Wilmington and that the cost of overhead was less important than the acquisition of new business and increased profits. Visco also said Respondent needed relief on rent and utility costs, but that labor costs were not an important factor in the relocation decision to be made. Respondent consistently maintained that position on labor costs. The Union, through Hayman, voiced its suspicion that a decision to close Wilmington had already been made because there had been no replacement for the retired vice president of sales and marketing for Respondent, and thus no one to develop the needed sales. Visco replied those duties had devolved on George Rosica, Respondent's president. Visco also announced there were efforts underway to secure a reduction in the rent paid for the Wilmington premises.

Respondent's efforts to secure a rent reduction had commenced long before the recognition of the Union as its employees' collective-bargaining representative. The situation vis-a-vis Respondent's position as a tenant in its plant and its rent situation is best understood by a brief excursion into the plant's history. On June 30, 1988, Respondent, Harbor Associates (Harbor Assoc.) (in which Verino Pettinaro is a partner), and Harbor PK Corporation (Harbor PK) and Pettinaro Construction Company, Inc. (Pettinaro Construction), which are both headed by Verino Pettinaro as their president, entered into an agreement. Harbor PK was incorporated by Harbor Assoc. to: (1) hold title to the land owned by Harbor Assoc. on which the new Wilmington plant was to be built by Harbor Assoc. and completed for Respondent's use by December 31, 1988; (2) sell 25 percent of Harbor PK's stock to Respondent's owners for $112,500 cash; (3) contract with Pettinaro Construction to build the plant and receive $3,459,547 in exchange for the plant and the land on which it sits; and (4) to lease the land to Respondent. The building was delivered in March 1989. The monthly rent installment agreed on, amounting to about $40,000, was the monthly mortgage and interest thereon, plus 14 percent of that amount as a developer's fee, plus taxes and insurance. By letter of February 13, 1991, Respondent wrote Pettinaro the following:

> Dear Verino:
>
> It is with great reluctance that we are submitting this proposal outlining the terms under which Kaumaugraph Corporation might be able to continue its occupancy of 400 S. Madison Street.
>
> 1. As of the end of this month the lease, between Harbor PK Corp. and Kaumagraph Properties, Limited Partnership will be terminated, and the 25% of stock of Harbor PK Corp. held by tenant or its assigns will be delivered and transferred to Landlord, thereby terminating the tenant's further liability thereunder.
>
> 2. Commencing March 1, 1991 Kaumagraph Corporation will lease the premises on a month to month basis at the rate of $20,000.00 per month for a total period not to exceed 18 months, and either party may terminate such tenancy on 30 days written notice to the other party.
>
> 3. Kaumagraph Corporation agrees during its occupancy to be bound to all the other terms of the existing lease, as tenant, particularly to the terms of the Indemnity provisions contained in the first Amendment of Lease; and it acknowledges its obligation at the termination of its occupancy to pay the balance owed on the improvements made at its special request.
>
> 4. Kaumagraph Corporation agrees that if it is able to reconstitute its manufacturing business within the above 18 month period, it will use its best efforts to negotiate a new, long term lease for the premises on terms which are financially and commercially reasonable for both parties.
>
> If this meets with your approval you may make it effective by returning a signed copy.

The next letter Respondent sent Pettinaro was dated February 20, 1991, and states:

> Dear Verino:
>
> I understand from our conversation of February 15, 1991 that our effort to settle and compromise various issues between us as embodied in our letter to you dated February 13, 1991 is unsatisfactory. Therefore, you may consider the offer as withdrawn.
>
> We will continue to cooperate with you as our landlord in every possible way, including giving you as much advance notice of changing circumstances as is reasonable, but we continue to hope you will keep such matters in the closest confidence.

[5] ''Resorted'' appears to be a synonym for ''reinspected.''

Respondent was assessed late charges in July and September 1991 for not timely paying July, August, and September 1991 rent. Between the July and September assessments, Robert Rosini, Respondent's director of business development, wrote the following letter to Pettinaro on August 16:

> Dear Verino:
>
> The following outlines Kaumaugraph's proposal and the terms under which it can remain as a tenant at 400 South Madison Street.
>
> 1. The old lease will be terminated and a new one year lease beginning September 1, 1991 through August 31, 1992 will be entered into at a monthly rental of $15,000,000/month triple net.
>
> 2. We will relinquish our 25% ownership in the building.
>
> 3. Kaumagraph would like an option after the expiration of the lease to renew under the terms and conditions of the present lease.
>
> 4. Kaumagraph will agree to vacate on 60 days notice if you find another tenant during the period of the lease.
>
> 5. Kaumagraph will set up an appropriate payment schedule for repayment of monies due with the necessary guarantees.
>
> Kaumagraph believes this proposal will benefit you to the extent of having the following:
>
> l. Income from the building.
>
> 2. Payment of the insurance, taxes and utilities by Kaumagraph during the term of the lease.
>
> 3. Provide security for the building.
>
> 4. The distinct possibility that within the year the auto industry will turn around allowing us to remain at 400 South Madison Street.
>
> If an agreement cannot be reached we will be forced to vacate the facilities in the very near future.

Pettinaro directed the following letter to Rosini on August 20:

> Dear Bob:
>
> The following are a few ideas that we discussed today by telephone. The following ideas do not obligate me in any way what so ever, they are to be used only as a beginning point for discussions when I return from vacation on Monday, August 26.
>
> I understand that Kaumagraph has some immediate cash flow problems at the present time and I would like to propose the possibility of some type of the following:
>
>> Verino Pettinaro could lend Kaumagraph approximately $30,000 per month. Kaumagraph could use that $30,000 to pay their rent to Harbor PK Associates; or,
>>
>> Verino Pettinaro could buy stock in Kaumagraph at approximately $30,000 per month. Kaumagraph could take this money and pay their rent to Harbor PK Associates.
>
> These above possible scenarios would enable Harbor PK Associates to stay intact with the present owners and their proportionate share of ownership.
>
> These above possible scenarios would also allow Kaumagraph to get through their immediate problems until the economy gets better.
>
> I would also like to resolve, at this time, the $50,000 that Kaumagraph still owes Pettinaro Construction Company. This stems from problems with George Rosica and differences of opinions on the HVAC. Also, I would need some guarantees on the $250,000 that Kaumagraph owes to Pettinaro Enterprises.
>
> Bob, please give me a call on Monday, August 26, when I am scheduled to return from vacation and let me know your thoughts on whether or not the above possible scenarios would help Kaumagraph.

The alternatives of becoming further indebted to Pettinaro or permitting him to buy large chunks of Respondent's stock, with money 75 percent of which would flow to Pettinaro through Harbor PK, posed no reasonable solution to Respondent's financial problems and either would have tended to exacerbate rather than relieve Respondent's money problems. Pettinaro is currently suing Respondent for more than $5 million, and displayed implacable hostility toward Respondent on the witness stand. He appeared revengeful and his testimony did not impress me as being entirely candid. I do not credit his testimony that he did not reduce Respondent's rent because the need to so do was not documented by Respondent. This is no good Samaritan. As Pettinaro's August 20 letter to Respondent indicates, his interest was, properly I believe, directed at preserving and bettering his own personal financial status and that of his various enterprises involved here rather than to aid Respondent's financial situation.

Returning to the negotiations, the parties met on August 29. They discussed financial and other information the Union had received from Respondent. Union Staff Representative Hayman briefly raised the issue of Respondent's lack of a sales and support group, but there was no extended discussion on this topic.

On September 6, Burke was absent from the meeting because he had been transferred to the KFC operation in Michigan, at the expense of KFC, in order to relieve Respondent of his salary. The cost of saving was minimal in view of the large amount of money Respondent said it needed to survive at Wilmington. Hayman demonstrated that labor costs were as much as 20-percent higher at Wilmington than they were at Flint. Respondent did not then or ever advise the Union or imply that labor costs were a factor in its consideration to move work from its Wilmington, Delaware facility to the KFC Flint, Michigan facility. The parties, working from proposals presented by Respondent, agreed to several noneconomic items. Economics were not discussed.

On September 11, the Union proposed, as its initial offer, a 1-year wage freeze, and 4-percent increases in the next 2 years if Wilmington showed a profit. Visco promised this offer would be considered and he would respond. The parties agreed to several remaining noneconomic issues. Respondent provided the Union with additional information that the Union had requested on employee hours worked. Burke was not present at this meeting.

At the September 18 meeting, Respondent's attorney, Visco, again told the Union that labor costs were not a factor used to calculate Respondent's profitability and that reductions of 15 percent in labor costs and 10 percent in employee benefits would have no material effect on it.[6] Visco also advised there would be a management meeting the following week and that Respondent was considering the Union's wage proposal. The parties negotiated agreement on several other contract proposals before adjourning.

Five days later on September 23, according to Business Development Director Rosini and Executive Vice President Cetola, the Respondent's board of directors and Visco met and decided to close the Wilmington facility. It seems unusual that, as Rosini and Cetola testify, no written minutes were kept of this meeting, but their testimony is not inherently incredible and mere suspicion raised by the absence of written minutes does not warrant discrediting their testimony. Rosini and Cetola deny that any decision to close had been made prior to September 23. Both agree that the decision was necessitated by continuing operating losses and the failure to secure new business. Both assert that labor costs were not a material factor in the decision to close. Rosini points out that the Wilmington facility in Delaware was closing rather than the KFC plant in Michigan because the KFC plant was always profitable, the customer (Delco) was in Michigan and wanted the work done there for just-in-time delivery, and all the work done for Delco was done in Michigan, except for some overflow work diverted to Wilmington.

Visco met with the Union on October 2 and told Hayman and the others present that the decision had been made to close the Wilmington facility beginning December 9. He further stated a reduction in employee wages would not change that decision, there was no new business in the offing, and Delco wanted the Company to operate in Michigan if there was only going to be one location. Visco's latter statement regarding Delco's wishes does not support the argument that the customer did not want any work done in Wilmington. It merely states the customer's preference if the Respondent closed one of its facilities does not constitute a request to remove work from the Wilmington facility, and does not imply any dissatisfaction with work done in Wilmington. Similarly, the customer's letter to the Respondent on January 8, 1992, after the Wilmington closure had been decided on, to the effect Delco preferred the work be done at the Michigan installation, is not evidence that, prior to Respondent's decision on September 23, 1991, to close the Wilmington facility, Delco had adamantly insisted on having the manufacturing work done for it at Wilmington moved from Wilmington to Michigan. Absent some persuasive probative documentary evidence predating that decision and/or testimony to that effect from Delco representatives, I am not convinced Delco cared where the work was produced so long as it was well done and received on time. This conclusion gains considerable support from the testimony of Respondent's business development director, Rosini, that deliveries to Delco had in fact been on time since 1988, before the new Wilmington plant had been built, and continued to be on time until 1992, after Wilmington had been closed. Wilmington was producing parts for Delco which were then shipped to KFC in Michigan for delivery to Delco. This may have been a logistical problem for the Respondent, but not for the customer (Delco) who was in fact, according to Rosini, receiving its goods on time. In sum, there is no proof Wilmington's production and delivery time to KFC in Michigan prevented just-in-time delivery to Delco, and Rosini's testimony indicates it did not do so.

The Respondent is credited that there was no new business on the horizon when it decided to shut down the Wilmington facility. Moreover, the Respondent was in fact seeking rent reduction from Pettinaro at the same time it was advising the Union that rent reduction was the only thing, absent a sudden large infusion of new business, that would permit it to maintain production in Wilmington. That it was unsuccessful in those efforts does not mean it was not in good faith seeking that reduction. It would be farfetched indeed to conclude that the plea of need for rent reduction was but a ploy to mislead the Union. There is no evidence warranting an inference that the Respondent knew prior to its final decision to close Wilmington that Pettinaro would not make it some reasonable accommodation regarding rent reduction, given his large stake in keeping the plant, in which he and his companies had a large present and future financial investment, occupied and producing income and therefore payments, reducing the size of his risk. The fact that the Respondent sought rent relief and advised the Union such relief might enable it to remain in Wilmington is persuasive evidence it was acting in good faith when it so told the Union, when it approached Pettinaro on the matter 6 months prior to the contract negotiations, and when it followed up on that approach until it became apparent in August 1991 that Pettinaro was not inclined to provide the requested rent relief. The record provides no reason to believe that the Respondent's efforts to secure rent relief was a sham or that the Respondent knew its efforts were certain to fail. It is obvious that Pettinaro apparently knew Respondent was in a seriously negative financial situation from his August 20 letter to Respondent which reveals knowledge of the Respondent's money problems, and also that Pettinaro's proposal in that letter was designed to protect his investments. Although Pettinaro's proposal would not likely have been of any benefit to the Respondent in solving its financial problems and his proposal was reasonably calculated to do no more than resolve the situation favorably to his interests, it does show he was concerned about the money owed to him and his companies by the Respondent because of Respondent's financial status. This lends some support to Respondent's contention that its situation in Wilmington was desperate.

After Visco's announcement of Respondent's decision to close the Wilmington facility, the parties bargained a termination agreement covering the effects of the closing on Respondent's employees. This agreement was reached in December 1991, and there is no contention or evidence the related bargaining was in any way tainted by bad faith. As Respondent's posttrial brief correctly and concisely notes, the termination agreement provided severance pay and other benefits for employees electing to go to Michigan to work, including the offer of jobs at KFC at the rate of pay in effect at KFC, and moving expense and assistance, together with a relocation allowance and 2 months' free use of an apartment.

As a consequence of the Wilmington closing, the Respondent forfeited its 25-percent interest in that facility and by default became obliged to the city of Wilmington for the $605,000 balance due on a loan from the Wilmington Urban

[6] Cetola's testimony and notes to this effect are credited.

Development Action Grant Corporation (UDAG) for the maintenance or creation of jobs in Wilmington.

The Respondent and the Union each called an expert witness to examine and explain Respondent's financial condition at the time of the closure. Both experts are certified public accountants who, using different approaches (both acceptable methods of examination) in analyzing the same data and with different goals, came up with differing conclusions. James Rossini, the Union's expert witness, addressed himself to the issue of viability, and asserts that when he gives an opinion on finances he examines what he believes is a company's ability to survive and last. He defines viability as the ability to generate sufficient income to pay bills when due, and further states that a concern need not be profitable to be viable. Paul Murray, the Respondent's expert witness, who has for several years audited the records of Respondent and all its related companies named earlier in this decision, credibly relates that he advised the Respondent to close the Wilmington plant in October 1990 after determining there were insufficient sources for money to fund both plants (Wilmington and Flint) because sales had declined significantly during the first 6 months of fiscal year 1990, KFC's profits were down, Respondent's losses were increasing substantially, and KFC did not have sufficient resources to fund Wilmington's increasing losses. Murray explains he recommended closing the Wilmington plant rather than the Flint plant because: Flint's performance was better; the Flint plant was devoted solely to manufacturing for the automobile industry; practically all the sales of Flint and Wilmington were automotive; and there was a walkaway lease on the Wilmington premises as opposed to KFC's ownership of its Flint facility.

The Respondent did not follow Murray's advice and close Wilmington in October 1990 because Raymond G. Burke, Respondent's chairman and chief executive officer, believed the situation then was due to a temporary decline in the automobile industry which, as it recovered, would soon give rise to much greater sales in that industry. Burke advised Murray again in April 1991 that he was still anticipating more sales and had no intention of closing the Wilmington facility.

The fiscal year audits of the Respondent, KFC, and other properties under their common ownership have been prepared in the same format from 1988, before the Union commenced its 1989 organizing drive culminating in the 1991 settlement and the subsequent bargaining I have earlier described in this decision, to the present. Therefore no conclusion can be made that the method of preparing the audits related to the time period in which the union activity and subsequent events occurred and was employed with the design of disguising an unlawful intent to deprive the Union of representative status at Wilmington. Moreover, there is no reason on the record before me to question the accuracy of the audits. It is not surprising that Murray and Rossini, appraising the financial records of the Respondent and KFC from different perspectives as they did with Rossini stressing viability even absent a profit as he defines it and Murray looking at profit as an indicator of viability, came to differing conclusions.

The financial record in evidence show the Respondent had net losses of $1,495,660 in fiscal year 1989, $990,311 in fiscal 1990 (this includes losses of a subsequently discontinued subsidiary), and $3,812,738 in the fiscal year ending June 30, 1991. During the same fiscal years KFC had net incomes of $2,472,693, $2,794,266, and $1,115,963, respectively. Although the audit for fiscal year 1988 shows the Respondent had a net income of $715,450, this is misleading because the facility it inhabited prior to moving into the Wilmington facility with which this case is concerned was sold for $1,472,000. If it were not for this one-time gain, the Respondent's audit would have shown a loss of approximately $757,000. Thus, the Respondent has not shown a profit from its operations since it entered the Wilmington plant. The dramatically increased losses of Respondent and decreased income of KFC in fiscal 1991 were more than likely the result of a downturn in the automotive industry which directly affected both companies because their primary and sole customer Delco, a subsidiary of General Motors, reduced its orders by one-half in February 1991. During this time, Wilmington performed production work supplementing work of the same type being done at KFC in Michigan and shipped its production to KFC, which then delivered it to Delco.

Throughout its existence Respondent has had financial problems, and became heavily dependent on KFC for financial support. Respondent's ability to meet its obligations became so severe that the Bank of Delaware, in March 1991, agreed to refinance Respondent's $3.8 million loan and grant it a $1.5 million line of credit only on the condition that KFC replace the Respondent as the primary obligor. In exchange for KFC's assumption of its debt and securing its line of credit, Respondent transferred certain of its assets, including title to equipment at Wilmington, to the accounts of KFC.

The picture of Respondent's financial disarray requiring adjustments agreed on at the September 23, 1991 meeting of the Respondent's board of directors, and later announced to the Union, is plausible. On the other hand, there is evidence that does not fit well with a conclusion the Respondent's representations in this regard are entirely accurate, notably the following extract from Respondent's accountant Murray's note B written in December 1991 and attached to Respondent and KFC's combined financial statements for the fiscal years ending June 30, 1991, and June 30, 1992:

> From inception KFC (which has operated a plant in Michigan) has been profitable while K Corp (which has operated a plant in Wilmington) and related entities have incurred operating losses. From July to December, 1990 K Corp's operations became increasingly unprofitable due to the substantial decline in sales as a result of the US auto market decline. In response, from Jan. through March, 1991, management of the Companies developed a plan to:
>
> 1. Discontinue their electroluminescent lighting business.
> 2. Consolidate their domestic operations by closing their Wilmington plant and reducing overhead.
> 3. Refinance their existing debt
> 4. Transfer their excess plant equipment to Europe
> 5. Continue plans to build and equip a plant in Europe.
>
> The accompanying income statement includes the following charges related to the above restructuring:

	June 30	
	1991	*1990*
Other charges:		
Writeoffs related to Wilmington operations:		
Program costs	$373,885	- 0 -
Estimated costs of plant closing	400,000	
Other	45,594	
	$819,479	- 0 -
Equity in loss of Kaumagraph, Ltd. (See Note E.)	310,300	- 0 -
	$1,129,779	- 0 -
Discontinued operations:		
Electroluminescent lighting (KEL)	$670,120	$651,087
Transfer business (KDT)		637,247
	$670,120	$1,288,334

> Management expects to terminate operations in Wilmington in January, 1992. Estimated shutdown and out of pocket costs of closing the Wilmington plant of $400,000 have been accrued as of June 30, 1991. Recurring operating losses of this plant have not been accrued. The losses from discontinued operations include KEL which was terminated June 30, 1991 and KDT which was terminated Sept. 30, 1990. The loss on disposition of KDT ($250,000) was accrued for as of June 30, 1990.

Point 2 and the prefatory language flatly states that a plan had been developed no later than March 1991 to close the Wilmington plant. This runs counter to Respondent's representation no decision to shut down Wilmington[7] was made until September 23, 1991, but does not necessarily require a finding the plan was then set in concrete and unchangeable. Murray's testimony that the word ''plan'' in the first paragraph of the above-noted extract meant an investigation is not convincing and is not credited. The failure of Burke (whom Murray points to as the person who makes the decisions for Respondent) to testify concerning the decision to and reasons for the relocation of the work to KFC is unexplained. Consistent with the existence of a plan to consolidate domestic operations at Millington, which Murray's audit note sets forth, is KFC's action of contracting for a 100-by-75-foot addition to the Millington facility on May 30, 1991, with completion date in September 1991. Similarly, the beefing up of the Millington production force from 97 in June 1991 to 120 in July, and thereafter in successive months in 1991 to 131, 139, 150, 157, and 178 is or may be indicative of the execution of a preordained consolidation plan. This increase in employees may have been due to increased work unrelated to such a plan, but there is no persuasive evidence to that effect.

[7] I agree with the Union's counsel that the reference to the ''Wilmington plant'' clearly means the facility whose closure is an issue in the complaint here.

C. *Conclusions*

1. The 8(a)(3) allegation

The presettlement threats to close the Wilmington facility, the evidence that Respondent had at least a tentative plan to shut Wilmington down as early as March 1991[8] but advised the Union in August no such decision had been made, the purported failure to keep minutes of a meeting of its directors wherein a momentous decision to close a facility was purportedly made, the failure of Attorney Visco or Chairman and Chief Executive Officer Burke to testify in support of Respondent's defense even though they were principal participants in the bargaining and decision to close Wilmington, the expansion of Millington contracted for and begun prior to the date that Respondent claims the closure decision was made, the beefing up of the Millington work force prior to the claimed decision date, the proffer of a claim, which I do not credit, that Delco's demand or request that all work done for Delco be performed in Michigan,[9] and the timing of the closure announcement only 3 days after the Regional Director approved the settlement agreement in the prior case are sufficient to warrant an inference the Respondent's hostility toward union representation of its employees was a motivating factor in its decision to close the Wilmington facility. That being the case, the burden now shifts to Respondent to demonstrate that the closing of Wilmington and the related work transfer would have taken place in the absence of union representation. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The Respondent is not required to prove its defense beyond a reasonable doubt, but only by a preponderance of the evidence even though there is some evidence tending to negate that defense. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

Although I have found the Respondent had a tentative plan to close Wilmington prior to recognition of and negotiation with the Union, the very fact that Respondent was considering closing Wilmington as early as January 1991 lends support to its contention that recognition and bargaining were not the triggering events for the closure plan. Some weight must be accorded the Respondent's search for rent reduction. It cannot fairly be concluded on the record before me that Respondent knew these efforts were foredoomed or that if the reduction sought was gained, the Respondent would still close the plant. It seems to me that by announcing to the Union it was seeking rent relief to enable it to continue operations in Wilmington, the Respondent bound itself to continue operating if the relief was obtained and was in no position to renege on this position. I find that even though a preliminary decision to close Wilmington was made in March 1991, the Respondent clearly conveyed to the Union that the plant would be kept open if there were a sufficient increase in sales or decrease in rent.

Most importantly in support of Respondent's position is the simple fact that although the Wilmington operation may

[8] It was decided by March 1991 to close Wilmington in January 1992. The closure was in February 1992. Respondent did not accelerate the closure to avoid bargaining with the Union.

[9] In referring to this claim regarding Delco's demands or preference I specifically note Rosini's concession that Delco deliveries were on time from 1988 to 1992.

have still been viable, i.e., could have been continued on a no-profit basis, it had always been a losing operation, and was kept afloat by the considerable financial assistance provided by KFC, which had always been profitable. Moreover, the work being performed by the Wilmington facility, which was the overflow work from KFC, makes the addition of more space to the Millington plant (located only about 20 miles from Delco whose orders financed both KFC and the Respondent) that is owned by KFC at a monthly mortgage of about $5500, as opposed to the monthly rent at Wilmington of about $40,000, an attractive and reasonable venture from a financial standpoint. I also note there is no good reason shown from a financial or other business-related point of view for Respondent to keep a facility at Wilmington.

The evidence cuts both ways in several instances as the foregoing discussion of the case for and against the finding of a violation of the Act demonstrates. The issue is not whether the Respondent could have continued its Wilmington operation but whether it would have continued operating in the absence of union representation of its employees. It is a close question, but given its longterm financial condition, which is shown by its records to have been abysmal, the fact the Respondent was considering the closure and decided by March 1991 to effect it in the absence of a financial windfall, i.e., a large increase in sales or a large decrease in rent, the fact Respondent was seeking rent relief before negotiations began and continued to so do, and the fact the income of the Wilmington facility depended on the success of KFC in obtaining automotive work, I am persuaded the Respondent would not have scuttled its plan to close Wilmington even had the Union never appeared on the scene. The closure and relocation therefore did not violate Section 8(a)(3) of the Act.

For what it is worth, I also note that although the Respondent argues a 10(b) defense[10] with respect to some of the evidence, it does not mention the fact that if, as I have found, the preliminary decision to relocate was made in March 1991, it was made more than 6 months prior to the filing of the initial charge in the instant case in January 1992. I therefore find the Respondent has, by not raising this defense, waived any defense this might afford it under Section 10(b) of the Act. See, e.g., *Petosky Geriatric Village*, 295 NLRB 800, 802 fn. 2 (1989).

2. The 8(a)(5) allegation

The parties stipulated the closing of Wilmington and the transfer of its work to Millington was a relocation of unit work unaccompanied by a basic change in the nature of Respondent's operations. The decision to relocate is therefore prima facie a mandatory subject of bargaining, *Dubuque Packing Co*., 303 NLRB 386, 391 (1991), and cases cited therein, which further provides an employer may show bargaining over the decision is unnecessary by showing by a preponderance of the evidence that direct or indirect labor costs were not a factor in the decision or, even if they were, the union could not have offered labor cost concessions sufficient to change the decision to relocate.

[10] Sec. 10(b) of the Act provides that no complaint shall issue based on conduct occurring more than 6 months prior to the filing and service of a charge.

From the beginning of negotiations, Visco advised the union repesentatives that the closing of Wilmington was contemplated and could only be forestalled by a very large multimillion dollar and very quick increase in sales or, alternatively, a substantial decrease in its monthly rent. The sales did not increase and the rent did not decrease. The monthly relief sought from Pettinaro was approximately $25,000 in February and $30,000 in August 1991. Although Hayman on one occasion mentioned to Visco that the Union had had some success in other instances in securing rent reduction, and Visco responded that such action would be welcome and if successful the Company ''might be in business,'' there is no evidence the Union exerted any efforts in that direction. Visco plainly advised the Union the Respondent's financial situation could not be sufficiently bettered by reduction of labor costs to warrant keeping the Wilmington operation going. This does not seem to be an unreasonable position when one considers that in order to produce the $25,000 rent relief sought in February, each of the Respondent's 48 employees in August 1991 would have had to sacrifice $520 a month in wages.[11] It is unrealistic to assume that a wage sacrifice of that scope for the foreseeable future, which would have been necessary, would have been possible to achieve. Wages are but one component of labor costs, but there is no showing of any other area of labor costs that significant cost savings could have been made. The Union offered no real help in this direction by proposing a 1-year wage freeze, even though company records reflected that the labor cost ratio had gone as high as 31.4 percent at Wilmington as opposed to 17.8 percent for KFC in fiscal 1989, and Wilmington's labor cost ratio was considerably higher than KFC's in fiscal years 1987 and 1988. The freeze would not have lessened this ratio. It merely would have preserved the unsound status quo.

The General Counsel's posttrial brief advances the following proposition, among others:

> [T]he probative evidence supports a finding that labor costs were a factor. Thus, at the first bargaining session, it is uncontroverted that the Respondent informed Hayman that if the Union got Respondent relief on its overhead in Wilmington, they might be in business. In addition, Respondent virtually conceded that labor costs were a factor in the decision to relocate, when Robert Rosini admitted on cross examination that the Respondent probably would have remained in Delaware had Pettinaro provided the requested rent relief.

I do not agree that advice the Wilmington plant probably or might remain operational if it received relief on its overhead costs and/or rent relief translates into evidence that labor costs were a factor in the relocation decision.

I have read the testimony, examined the relevant records, and considered the arguments of counsel before arriving at my conclusion, which is: (1) that the evidence preponderates in favor of a conclusion the Union could not have offered labor cost concessions sufficient to change the relocation de-

[11] If Wilmington's employees wages were cut by $2 an hour to match those in Flint, each employee's wages would be reduced by about $350 per month per each employee who worked a 40-hour week. This translates to about $16,800 a month total, far short of what was needed.

cision; and (2) that labor costs were not a significant factor in the relocation decision. Accordingly, I find Respondent did not violate Section 8(a)(5) of the Act. In making this decision I have considered that Visco (Respondent's attorney), intentionally or otherwise, incorrectly advised the Union no decision on relocation had been reached prior to September 1991. He did, however, from the beginning of negotiations advise the Union that Respondent would relocate its work if it could not obtain the relief he specified. The Union was given full opportunity to bargain on the decision, but offered little help in resolving Respondent's problems. I believe Respondent was bargaining in good faith with the Union, and that the Wilmington work would not have been relocated if the rent and/or sales figures had improved in the manner Visco advised was necessary, but they did not improve.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.